FILED
MAY 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

Brief of the
California State Public Defenders Association,
California Attorneys for Criminal Justice,
Office of the California State Public Defender,
Los Angeles County Public Defenders Association,
Los Angeles Criminal Courts Bar Association,
Office of the Los Angeles County Public Defender,
As Amicus Curiae in Support of Appellants.

HERBERT M. BARISH,
19-115 Criminal Courts Building,
210 West Temple Street,
Los Angeles, Calif. 90012,
(213) 974-2919,
Counsel for Amicus Curiae.

WILBUR F. LITTLEFIELD,
ANTHONY S. JONES,
Of Counsel

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

Page

Statement of Interest of Amicus Curiae 1

Summary of the Argument 2

Argument 3

I.

California Criminal Defense Attorneys Oppose Cameras in Courts Without Defendant's Consent 3

II.

Displaying the Accused for Television Is in Itself a Denial of Due Process 5

A. The Accused Does Not Lose All Rights of Privacy When Charged With a Criminal Offense . 5

B. Publicly Displaying the Accused During Trial Is a Form of Punishment 7

C. Pillory of the Accused Is a Major Form of Punishment 8

D. Public Humiliation Raises Due Process Issues 9

E. The Courts May Not Abdicate to the Television Industry Responsibility for Protecting the Accused 10

III.

The Practice of Televising In-Court Proceedings Has Adverse Effects Upon a Trial and Its Participants .. 11

A. Television Interferes With the Purpose of a Fair Trial 11

B. Television Has Adverse Effects on Trial Participants 12

1. Behavior of Participants Adversely Affected 12

2. Effect on Jurors 13

Page

3. Effect on Witnesses 16
4. Effect on Judges 18
5. Effect on Lawyers 19

IV.

The Burden Is on Those Who Bring Television Into the Court to Demonstrate That Television Has No Effect 21

A. Pro-Television Advocates Have Attempted to Place the Burden on the Accused to Show Prejudice 21

B. Common Sense Means the Burden of Proof Passes to Those Bringing Cameras Into the Courtroom 23

C. Both Common Law and Constitutional Law Place the Burden on Those Bringing Cameras Into the Courtroom to Show There Was No Error 24

Conclusion 29

TABLE OF AUTHORITIES CITED

Cases — Page

Bruton v. United States, 391 U.S. 123 (1968) 24
Chapman v. State of California, 366 U.S. 18 (1967) 26
Coffin v. United States, 156 U.S. 432 (1895) 6
Cox v. State of Louisiana, 379 U.S. 539 (1965) 12
Estelle v. Williams, 425 U.S. 501 (1976) 6, 23
Estes v. Texas, 381 U.S. 532 (1965) ..... 8, 11, 12 ..... 13, 16, 18, 29
Gannett Co. Inc. v. De Pasquale, 99 S.Ct. 2898 (1979) 27
Griffin v. California, 380 U.S. 609 (1965) 30
Houchins v. KQED, 98 S.Ct. 2588 (1978) 8
Krulewitch v. United States, 336 U.S. 440 (1949) ... 24
Matthews v. Eldridge, 424 U.S. 319 (1976) 22
Murchison, In re, 349 U.S. 133 (1955) 12
Nixon v. Warner Communications, 98 S.Ct. 1306 (1978) 27
Post-Newsweek Station, Florida, Inc.; for Change in Code of Judicial Conduct, In re Petition of, 370 So.2d 764 (1979) 5, 12, 13, 25
Rideau v. State of Louisiana, 373 U.S. 723 10
Sheppard v. Maxwell, 384 U.S. 333 (1966) 22, 27
Taylor v. Kentucky, 98 S.Ct. 1930 (1978) 6
Wisconsin v. Constantineau, 400 U.S. 433 (1971) ... 9
Wolston v. Readers Digest Ass'n Inc., 99 S.Ct. 2701 (1979) 9

Miscellaneous

Los Angeles Times, Part I, pp. 1, 16 (May 19, 1980) 30

Page

Los Angeles Times, Part I, p. 10 (May 22, 1980) 30

New York Times, Sec. C, p. 18 (April 21, 1980) 11

Weisman, TV Goes on Trial, TV Guide, p. 10 (January 14, 1978) 7

Statute

United States Constitution, Fourteenth Amendment 26, 28

Textbooks

American Bar Association: Cameras in the Courtroom, A Presidential Showcase Program, p. 133 (1979) 15, 16, 20

A Sample Survey of the Attitude of Individuals Associated With Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977 and June 30, 1978 ..... 16, 17

Barish, The Television Siren Sings to the Courts, 5 Criminal Defense, pp. 5, 6 at n. 6 (July-August 1978) 3, 4, 6, 10

Block, I.J., Cameras and Courtrooms: The Denial of Due Process, 52 Fla. Bar Journal, p. 454 (June 1978) 14, 15, 17, 18

Buchanan, R., B. Pryor, M. Meeske, D. Strawn, The Florida Experiment 15 Trial, pp. 34, 35 (April 1979) 18, 19, 20

Deutsch and Gerard, A Study of Normative and Informational Social Influences Upon Individual Judgment, 51 J. Abnormal and Social Psychology, p. 629 (1955) 14

Fatzer, Cameras in the Courtroom: The Kansas Opposition, 18 Washburn Law Journal, pp. 230, 239 (1979) 19

Page

Fox, Radio and TV in Courtroom Voted Down by State Bar, 181 N.Y. Law Journal, p. 1 (Jan. 29, 1979) 20

Gerbner, Trial by Television: Are We at the point of no return? 63 Judicature, pp. 417, 421 (April, 1980) 5, 19, 23

Mouton, Jane S., Robert R. Blake and Joseph A. Olmstead, The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity, 24 J. Personality, p. 339 (1956) 14

Murphy, Trend to Televised Court Proceedings, 181 N.Y. Law Journal, p. 25 (Jan. 1979) 21

Note: Televised Trials: Constitutional Constraints, Practical Implications and State Experimentation, 9 Loyola Law Journal, pp. 910, 933-934 (1977-78) 13

Paul and Mandel, A Remedy for Smear-by-Congress, 122 New Republic, p. 14 (Feb. 27, 1950) 8

Raven, Social Influence on Opinions and the Communication of Related Content, 58 J. Abnormal and Social Psychology, p. 119 (1959) 14

Rush, Benjamin, An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society (Philadelphia 1787) American Law: The Formative Years (Anno. Press, N.Y. 1972), p. 14 .....8, 9, 29

IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1260

NOEL CHANDLER and ROBERT GRANGER,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

AMICUS CURIAE BRIEF.

Statement of Interest of Amicus Curiae.

The California State Public Defenders Association is an organization composed of approximately 2,000 public defenders in various offices throughout the state and other criminal attorneys.

California Attorneys for Criminal Justice is the statewide association of criminal defense attorneys numbering approximately 1,200.

The Office of the State Public Defender is an agency of California State Government which is charged with the representation on appeal of indigent criminal defendants.

The Los Angeles County Public Defenders Association is an organization composed of approximately 400 public defenders.

The Los Angeles Criminal Courts Bar Association has approximately 600 members.

The Office of the Los Angeles County Public Defender represents indigent criminal defendants.

The filing of this brief reflects the concern of *amicus* that criminal defendants in California will have to suffer denial of due process if this Court approves the unrestricted use of television cameras in the courtroom. Experiments similar to those in Florida have been proposed in California.

Amicus has requested and obtained the written consent of all parties to file this brief.

Summary of the Argument.

Appellants in this action contend that televising their trial over their objections is a violation of due process.

Amicus will argue in this brief that:

1. Televising defendants over their objections is itself a denial of due process.
2. Television in the courtroom will adversely affect the other trial participants, thus denying a defendant a fair trial.
3. Proponents of televised courtroom proceedings must bear the burden of proof that television does not have an adverse impact on trial participants and will not deny a defendant due process.

ARGUMENT.

I.

CALIFORNIA CRIMINAL DEFENSE ATTORNEYS OPPOSE CAMERAS IN COURTS WITHOUT DEFENDANT'S CONSENT.

Why do the Criminal Defense Attorneys in the State of California oppose the televising of trials over the objection of the defendant? Shouldn't the attorneys desire to appear on television? After all, we all know that criminal defense attorneys are a flamboyant bunch who love to be in the limelight. Many seek out and enjoy publicity. Or has this bunch of attorneys changed its stripes? Perish the thought! The criminal defense bar, with few exceptions, is still composed of the same publicity-loving, flamboyant, egomaniacs it has always had.

Why, then, would they reject the opportunity for instant fame? Why reject all the wonderful publicity? Maybe, despite the personality flaws inherent within the profession, the interest of the client still comes first. As a matter of fact, it is precisely that interest that compels the Criminal Defense Attorneys in California to submit this brief.

Experiments similar to those in Florida have been proposed in California and have been modified only because of Certiorari being granted in the *Chandler* case.

What is it that the Criminal Defense Attorneys fear? They fear the exposure on television will act as a form of punishment of their clients, without consideration of guilt or innocence. They fear that their clients will be permanently stigmatized as much as if they were branded.

The defense attorneys fear the impact of television on the trial participants. They are aware that they themselves may change their behavior as a result of appearing on television. Barish, *The Television Siren Sings to the Courts,* 5 Criminal

Defense 5, 6 at n.6 (July-August 1978) (hereinafter *The Television Siren*). They know that such changes will not be for the benefit of the client, but for the image of the attorney. They know that they will yield under the pressure of public exposure. After all, criminal defense attorneys are subject to the same human foibles as the rest of humanity.

California's criminal defense attorneys, cognizant of their own weaknesses as human beings, are aware those same weaknesses exist in others. They know that all who appear on televised proceedings will be influenced by the existence of cameras. They are concerned because witnesses, prosecutors, judges and jurors are also subject to the pressures of public exposure.

The California criminal defense attorneys believe that the system works best for their clients and for society as a whole, when the system is as free as possible from outside influences. When outside influences affect the participants, then due process of law suffers.

We believe that televising court proceedings is unfair to and denies the accused due process of law. Those same lawyers further believe that televising the proceedings denies others in the system fair treatment, and is detrimental to the system of justice.

> The great show trials and public confessions of the twentieth century occurred under dictatorships and during periods of witchhunt in democracies. They were part of the entertainment mainstream, now joined by much of what we call news, compelling attention, exposing deviation, spreading fear, and cultivating conformity.
>
> The struggle to remove trials from the public arena parallelled the fight against secret proceedings and the Star Chamber. In fact, the two are sides of the same coin. Arbitrary power wants no public witness to its

> private deliberations but needs all the hoopla it can get to legitimize its actions.
>
> The integrity and independence of judicial proceedings serve to protect the accused from both arbitrary power and public prejudice. The purpose of open trials is to help assure observance of these protections, not to entertain or even to educate.

Gerbner, *Trial by Television; Are we at the point of no return?* 63 Judicature 417, 421 (April, 1980).

II.

DISPLAYING THE ACCUSED FOR TELEVISION IS IN ITSELF A DENIAL OF DUE PROCESS.

A. The Accused Does Not Lose All Rights of Privacy When Charged With a Criminal Offense.

> It is significant that most of the key participants in a jury trial, including jurors, witnesses and defendants (in criminal cases) are in the courtroom not because they have elected to be but because they have been required to attend and participate. This fact alone distinguishes a judicial proceeding from one involving legislative or executive proceedings.

In re Petition of Post-Newsweek Station, Florida, Inc. For Change in Code of Judicial Conduct, 370 So.2d 764 (1979) (hereinafter *Post-Newsweek*), (Report of the Florida Conference of Circuit Judges, at 1) [Available at the National Center for State Courts, Williamsburg, Virginia]. The Florida Conference of Circuit Judges saw the televising of proceedings as an invasion of privacy.

"The right to privacy of persons who have not otherwise lost that right should be preserved to witnesses and persons summoned to jury duty." *Id.* at 23.

Those supporting televised proceedings also saw a privacy interest involved. The following quote about televised

proceedings is by the chairman of a committee that recommended to the American Bar Association that it change its standards to permit televised proceedings (the ABA rejected the specific proposal).

> [The defendant] doesn't have a right to privacy once he makes himself an object of public interest by getting indicted and brought into court. His privacy is pretty well exhausted when he finds himself the object of that much attention.

The Television Siren, supra, at 7 (quoting Judge Alfred T. Goodwin of the Court of Appeals for the Ninth Circuit).

Concepts of privacy are not limited to solitary individuals in closed rooms. Privacy is seen as a right to avoid publicity and display. It is obvious that a person charged with a crime loses by necessity, some of his privacy. After all, the traditional trial process requires the accused to be present in the courtroom where others are also present.

The problem arises when a person is displayed to the community for reasons *not necessary* for the court process. The only rights the accused should lose are those *necessary* for the orderly conduct of the court proceedings. Any other loss of rights should only occur as a result of a proper sentencing procedure after a conviction. The presumption of innocence is imbedded in our system.

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895); *see also Estelle v. Williams*, 425 U.S. 501 (1976), and *Taylor v. Kentucky*, 98 S.Ct. 1930 (1978).

While the accused, who is presumed innocent, sits through trial, there should be no loss of rights or privileges except those absolutely necessitated by the fact finding process.

B. Publicly Displaying the Accused During Trial Is a Form of Punishment.

Who has not seen in the news media pictures of persons arrested who are covering their faces to avoid the public condemnation that occurs by such exposure. THEY KNOW THE EFFECT OF SUCH EXPOSURE without the need for sophisticated studies.

Television personnel have noted that cameras in the hallways or on the courthouse steps always seem to catch a defendant "coming out and he's hiding his face. That might give the impression that he's guilty." Weisman, *TV Goes on Trial,* TV GUIDE 10 (January 14, 1978) (quoting Ralph Renic, vice-president and news director for WTVJ, Miami's CBS affiliate.) Are we to believe that television advocates are in fact trying to preserve the presumption of innocence by photographing the defendant in the courtroom, where he cannot hide his face?

Displaying the accused on television during the trial will act to permanently stain the reputation of the accused and forever cause that shame to be placed upon that individual's family! IF PERMITTED, THE TELEVISION CAMERA CAN BECOME A NEW PILLORY.

Even 30 years ago when our communications media was in its infancy compared to today, what was happening was clearly identifiable. Look at what was said in 1950.

> [M]odern conditions have magnified the power of congressional defamation to do harm and have made it impossible to dismiss lightly its consequences to individuals. A hundred years ago legislative voices

> carried but a short way beyond the walls of the capitol. Pillory by publicity today, is nationwide; a man cannot live down a bad name given to him in the national press by moving to another town.

Paul and Mandel, *A Remedy for Smear-by-Congress,* 122 New Republic 14 (February 27, 1950).

So the concept that publicity can act in the same manner as the old public humiliations is not a new idea. This power was recognized by the court in *Estes v. Texas,* 381 U.S. 532 (1965).

"The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. . . ." *Id.* at 549.

Even those who have been convicted retain some rights.

> [I]nmates in jails, prisons or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters however "educational" the process may be for others.

Houchins v. KQED, 98 S.Ct. 2588, 2592 at n.2 (1978).

Should the rights of those not convicted by any less?

C. Pillory of the Accused Is a Major Form of Punishment.

> Crimes produce a stain, which may be washed out by reformation, and which frequently wears away by time. But public punishments leave scars, which disfigure the whole character and hence persons who have suffered them are ever afterwards viewed with horror or aversion.

Benjamin Rush, *An Enquiry Into the Effects of Public Punishments Upon Criminals, and Upon Society* (Philadelphia, 1787), p. 14, as quoted in *American Law: The Formative Years* (Anno Press, N.Y., 1972).

The evils of the stain of such public display of individuals was apparent over 200 years ago. The display on television of an individual forced to sit at the counsel table is little different from the ancient process of placing a person in stocks. He is involuntarily placed in a position for public display, facing the humiliation of such exposure.

> [T]he majority will more likely resemble respondent drawn into a public forum largely against their will in order to obtain the only redress available to them or to defend themselves against actions brought by the state or others.

Wolston v. Readers Digest Ass'n Inc., 99 S.Ct. 2701, 2708 (1979).

Those seeking to defend themselves against actions brought by the state will now find the burden of being publicly displayed placed on the exercise of that right.

D. Public Humiliation Raises Due Process Issues.

"[W]here the state attaches a badge of infamy to the citizen, due process comes into play." *Wisconsin v. Constantineau,* 400 U.S. 433, 437 (1971).

The court in that case ruled that when a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, due process rules come into effect. To think that holding people and displaying them for the television cameras is any less onerous than posting a name in local bars is illusory.

The state cannot claim that they are merely conducting trials and the telecasting is something separate from them. It cannot participate and then claim no responsibility. The circumstances inevitably prove otherwise.

> The record fails to show whose idea it was to make the sound film, and broadcast it over the local television station, but we know from the conceded circumstances

> that the plan was carried out with the active cooperation and participation of the local law enforcement officers.

Rideau v. State of Louisiana, 373 U.S. 723, 725 (1963).

E. The Courts May Not Abdicate to the Television Industry Responsibility for Protecting the Accused.

If there is to be public humiliation as a punishment, then it should only occur as a result of a legally imposed sentence after conviction. While the courts should not concern themselves with how the local news programs are presented, it is of concern when the courts place persons presumed innocent in a position to be humiliated and disgraced by the media. The courts must not abdicate their responsibility of ensuring that no one is punished without due process of law; nor should they turn that responsibility over to others.

Since television is not required to be permitted in the courts, it can come in only by invitation. If that invitation is extended, the responsibility for the effect of television on the accused will be on the courts, not the media.

> One of the dangers some judges and lawyers see in broadcasting trials is that 30 seconds of selected . . . material coming out of a 3 week trial will probably not present a very accurate picture of what's going on. But again that's a problem for the media to work out. It isn't a case where the legal profession has any interest in censorship.

The Television Siren, supra, at 9, n. 10 (Statement of Judge Alfred T. Goodwin).

That may be true during normal news coverage. However, when the state takes an individual and places him on public display, it is responsible for the consequences.

III.

THE PRACTICE OF TELEVISING IN-COURT PROCEEDINGS HAS ADVERSE EFFECTS UPON A TRIAL AND ITS PARTICIPANTS.

Headline:

TV CAMERAS BARRED AT CBS'S MEETING.

CBS Inc., which has been a leader in the efforts to gain admittance for television cameras to courtrooms and Congressional proceedings, last Wednesday barred television coverage of its own annual stockholders meeting in New Orleans. The company did permit newspaper reporters to attend.

In the past, CBS had allowed the meetings to be covered by accredited television-news organizations, and the network has subsequently decided to let accredited television-news camera units cover future meetings.

"We regard this as a private meeting open only to stockholders of the corporation." William S. Paley, chairman of CBS, said at the event. "As a matter of policy, we barred all television cameras from coming into our meeting, including our own."

Mr. Paley explained at the meeting that the presence of cameras had disrupted a previous meeting and that stockholders had complained.

• • • •

New York Times, Section C, p. 18, April 21, 1980.

A. Television Interferes With the Purpose of a Fair Trial.

In *Estes v. State of Texas,* 381 U.S. 532, 540 (1965), Mr. Justice Clark, for the Court, stated that "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." Television in no way contributes to this objective.

In fact, its impact interferes with the very purpose of a fair trial.

> Its use amounts to the injection of an irrelevant factor into court proceedings. In addition, experience teaches that there are numerous situations in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge.

Id. at 544-545.

Controversies, both criminal and civil, are to be adjudicated "in the calmness and solemnity of the courtroom according to legal procedures." *Cox v. State of Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting). Bearing in mind that "fundamental conception" of what should constitute a fair trial, television's presence only detracts from that solemnity.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

In re Murchison, 349 U.S. 133, 136 (Black, J.) (1955).

It has been noted that "most judges who reject cameras in the courtroom do so on the philosophical grounds that 'Justice must satisfy the appearance of justice.' They believe that our system of law must prevent even the possibility of unfairness to a defendant." *In re Petition of Post-Newsweek Stations Florida, Inc., For Change in Code of Judicial Conduct*, 370 So.2d 764 (1979) (hereinafter *Post-Newsweek*) (Report of David V. Strawn, Raymond W. Buchanan, Milan D. Meske and Bert Pryor, at 52).

B. Television Has Adverse Effects on Trial Participants.

1. Behavior of Participants Adversely Affected.

It has been said that "the adverse impact which television's presence has on the behavior of all the trial partici-

pants, from the jurors to the trial judge, impairs the defendant's ability to obtain a fair trial.''. Note: *Televised Trials: Constitutional Constraints, Practical Implications, and State Experimentation*, 9 Loy. L. J. 910, 933-934 (1977-78) (Hereinafter Note: *Televised Trials*).

In fact, the main problem associated with televised trials is the harmful psychological effect on the trial participants which is caused by the presence of television in the courtroom. (*See* Note: *Televised Trials, supra*, 9 Loy. L. J. at 932).

2. Effect on Jurors.

The court in *Estes* believed that the potential psychological impact of television upon jurors was ''of the greatest significance'' because ''they are the nerve center of the fact-finding process.'' *Id.* at 545.

A juror thus plays a crucial role in a trial, and a fair trial depends upon the jurors' ability to remain free of external distractions and pressures.

Yet jurors surely are aware that there is a special notoriety to a televised trial, and that their actions will be judged by countless television viewers, none of whom will have had the benefit of the jury instructions which guide the jurors in their deliberations.

> Common sense tells us that jurors who are subjected to cameras in the courtroom would tend to feel that their performance will be judged by public sentiment.

Post-Newsweek, supra (Resolution of the Circuit Judges of the Fourth Judicial Circuit of the State of Florida on the Issue of Television and Other Cameras in the Courtroom, at 3) (hereinafter Resolution of Circuit Judges).

Courts have relied on experience and common sense in vocalizing their fears that televising jurors would add un-

warranted and harmful pressure to their burden of decision-making. Others agree.

> There can be no doubt that the judgment of jurors is greatly influenced by the presence of television cameras in the courtroom. In the first televised trial in Dade County, the jurors asked the trial judge if they could watch themselves on television during the evening recess . . . . Recently, one juror commented that the jury on which he sat withheld its decision because of the knowledge that the trial was being covered by television, and the jurors wanted to minimize the embarrassment that a speedy verdict would cause a member of the defendant's family.

I. J. Block, *Cameras and Courtrooms: the Denial of Due Process*, 52 Fla. B. J. 454 (June, 1978).

Psychological studies appear to support the proposition that the broadcast of notorious criminal trials, realistically the only ones which will be televised, would create such obvious public hostility that jurors would be pressured to convict. Psychological studies have been conducted which dealt with the effect of external influences on individual decision-making. These studies demonstrate that the ability to remain anonymous is a critical factor in allowing a person to adhere to his convictions and beliefs. [*See* Raven, *Social Influence on Opinions and the Communication of Related Content*, 58 J. Abnormal and Social Psychology 119 (1959); Deutsch and Gerard, *A Study of Normative and Informational Social Influences Upon Individual Judgment*, 51 J. Abnormal and Social Psychology 629 (1955).] In an article entitled *The Relationship Between Frequency of Yielding and the Disclosure of Personal Identity*, 24 J. Personality 339 (1956), authors Jane S. Mouton, Robert R. Blake and Joseph A. Olmstead arrived at the conclusion that "when the situation permits identification of the person whose be-

havior is different, susceptibility to conformance pressures is increased because the individual knows that he can be held personally accountable and required to explain his conduct.'' *Id.* Thus anonymity serves to shield the individual from external pressure, and allows him to freely make his decision. ''For any situation involving contradictory forces . . ., with individual reactions subject to criticism, the maintenance of independence in jurors should be increased by providing conditions of anonymity.'' *Id.* at 345.

External pressure to convict due to television's obvious denial of anonymity is not the only problem connected to television of jurors. The distraction caused by the knowledge that the ''all-seeing eye'' of the television camera is glaring at them can cause jurors to be distracted from the business at hand.

In jurisdictions where television has been allowed in the courtroom on an experimental basis, trial lawyers have confirmed judges' observation by reporting that they have seen jurors actually watching the television cameras rather than concentrating on the evidence. See Block, *Camera and Courtrooms: The Denial of Due Process, supra*, 52 Fla. B. J., n.5 at 454. Jurors themselves have commented:

> The average juror serves with some degree of apprehension and should be spared from unnecessary distraction, even if that distraction is only in the form of knowing that they are ''on camera'' at any time during the trial proceedings.

ABA: Cameras in the Courtroom, A Presidential Showcase Program, 133 (1979).

It is important to note that while the defense attorney has his back to the spectator section of the courtroom, jurors do not. The presence of cameras can act as an instant editorial comment about witnesses and testimony, depending upon who the camera is directed at, and when. Jurors can

not help but be influenced in weighing testimony by those controlling cameras. The defense attorney has no way of knowing what those with cameras are doing that can influence jurors.

3. Effect on Witnesses.

Television coverage of a witness has an impact upon him that is "simply incalculable." *Estes, supra*, 381 U.S. at 547.

Witnesses are very often quite reluctant to appear and testify even when trials are not televised. The prospect of occupying the "hot seat" and facing intense questioning from attorneys, and sometimes judges, is enough to make any witness nervous, hesitant, and reluctant to testify. Sitting under the gaze of lawyers, judges, and jurors is tough enough; but add to that the gaze of countless television viewers, and an intolerable situation results.

The converse is just as intolerable, however. The witness who "plays" to the television audience or "hams" it up may very well make a negative impression upon a jury, and thus jeopardize the trial. He won't be concentrating on simply telling the truth, which is his sworn duty.

Apprehensions about adverse effects of television coverage upon witnesses have been confirmed by states which have experimented with courtroom television. *ABA: Cameras in the Courtroom supra*, at 112 (Citing *A Sample Survey of the Attitude of Individuals Associated with Trials Involving Electronic Media and Still Photography Coverage in Selected Florida Courts Between July 5, 1977, and June 30, 1978* (hereinafter *Florida Survey*), prepared by the Judicial Planning Coordination Unit of the State Courts Administrator.) Three-quarters of the attorneys who took part in the Florida experiment said that they believed that mi-

crophones and cameras had made witnesses self-conscious or nervous. *Florida Survey*, Part II (A) (i) (iii) at 1-2.

That same survey revealed that television's presence in the courtroom caused fifty-three percent of the witnesses to feel self-conscious and over forty-six percent of the witnesses to be at least slightly distracted. Overall, over thirty-six percent of the witnesses opposed television, photographic or radio coverage. *Florida Survey*, Part II (A) (1) (i) at 5-7, 9.

A Florida Assistant State Attorney personally experienced witness reluctance due to the courtroom cameras:

> A case in point was a prosecution against police officers. Two main witnesses were police informants. They greatly feared reprisals from "the street" when their faces appeared on TV as police informants. Names given in the electronic or printed media do not have the same impact since very few informants are known on the street by anything other than nicknames or first names.

Florida Survey, supra, Part II (A) (2) at 19.

Comments by other participants in the Florida experiment echo those of the Assistant State Attorney. One participant said, "I think cameras in the courtroom, still or movie, are an invasion of privacy and add confusion and another hassle witnesses and families [of victims] have to cope with [during] . . . a traumatic and trying time." *Id.* at 6-9. Another who had actually viewed the proceedings on television responded: "[Watching the trials on television, I saw] the agony of some of the witnesses. . . . Surely, their ordeal was bad enough without the added trauma of knowing that their testimony was being televised." *Id.*

In another case a witness was so aware of the presence of the camera that he asked to testify with his back to the camera. *Block, Camera and Courtroom: The Denial of Due*

Process, 52 Fla. B.J. 454, n. 5 In another trial, witnesses were admonished not to listen to other witnesses' testimony yet the court discovered that during the trial the witnesses were actually listening to or watching other's testimony on television or radio. *Id.*

An attorney involved in the Florida experiment stated that "a witness must testify on TV concerning matters he believes very unpopular . . ."; or when a witness gives testimony which "tends to contradict a fact testified [to] by a greater number of witnesses . . ." he realizes this inconsistency is being witnesses by a vast television audience and he is consequently made to feel that "the public will think he is lying because he stands alone." R. Buchanan, B. Pryor, M. Meeske, D. Strawn, *The Florida Experiment* 15 Trial 34, 35 (April, 1979).

A prosecutor commented that "some witnesses were reluctant to put themselves in a bad light. Several were afraid for their own safety or that of their families." *Id.*

Televising witnesses thus can only serve to exacerbate an already difficult situation. Reluctance to testify in front of but a relatively few people in a courtroom will be magnified by the knowledge that vast audiences will be viewing on television. Likewise, witnesses who tend to bask in the limelight will indulge themselves in the notoriety and attention which television will focus on them. The result on both cases is that witnesses' attention will be on the camera instead of on their duty of telling their story truthfully. The real loser in all of this will be the defendant, for his right to a fair trial will necessarily be infringed.

4. Effect on Judges.

The judge's task is to "make certain that the accused receives a fair trial. This most difficult task requires his undivided attention." *Estes*, 381 U.S. at 548. Having to

supervise the presence of television cameras adds an unwarranted and irrelevant burden to the judge's responsibilities. In addition, should he decide that televising the trial would be detrimental to the best interests of the defendant, the judge would also be faced with the task of justifying any exclusion. "Such added responsibilities would certainly deflect at least part of the judge's attention which should properly be directed to the case." Fatzer, *Cameras in the Courtroom: The Kansas Opposition,* 18 Washburn L.J. 230, 239 (1979).

Furthermore, many judges are elected and must face the prospect of re-election. Television exposure can make or break any candidate, and incumbent judges are in position to utilize the free exposure that cameras in the courtroom provide. It has been pointed out that "about 10 percent of the electorate can now identify any judicial candidate during an election. A TV trial can easily multiply that recognition factor for a candidate." Gerbner, *Trial by television: Are we at the point of no return?,* 63 Judicature 417, 426 (April, 1980).

It is imperative that the attention of the trial judge, like that of jurors and witnesses, be centered upon the trial. Television makes this almost impossible. The "search for the truth" which is the hallmark of a fair trial is, again, sidetracked.

5. Effect on Lawyers.

No less than the other trial participants, lawyers representing all parties involved are adversely affected by the presence of cameras in the courtroom. 45.6 percent of the attorneys involved in the Florida experiment reported "serious discomfort" due to the television cameras. Buchanan, *et al., The Florida Experiment* 15 Trial at 35. (April, 1979). One attorney commented that other "attorneys played to

the cameras so badly that even the press joked about it." *Id.* at 36. An attorney with over ten years of experience observed that "because of the presence of TV, everybody acted differently and emphasis may have been placed in the wrong place." *Id.* Overall, 59.6 percent of the responding attorneys said that Florida Courts should not continue to use television. *Id.*

Prosecuting attorneys were not immune to television's deleterious effects. A prosecutor in Nevada discussed his experience with televised court proceedings:

> To be quite candid, I would have to say that I was periodically conscious of the cameras and realized that we could not cut and reshoot. At the time, I felt the television aspect was one more problem or pressure that had to be overcome along with the marshaling of facts, presentation of evidence, and winning the case before the jury. I would have to conclude: that the presence of television or motion picture cameras during a jury trial has somewhat a negative effect on an attorney's performance.

ABA: Cameras in the Courtroom, supra, at 76-77.

Gilbert Rosenthal, a New York City attorney, got right to the point: "Remember trial lawyers are hams at heart. . . . [W]e all know lawyers who take a case and make a cause of it. Can you imagine the result, or lack of result for their clients, if this [radio and television coverage] is permitted." Fox, *Radio and TV in Courtroom Voted Down by State Bar,* 181 N.Y. Law J. 1 (January 29, 1979). The result, of course, is damage to the defendant and his right to a fair trial.

IV.

THE BURDEN IS ON THOSE WHO BRING TELEVISION INTO THE COURT TO DEMONSTRATE THAT TELEVISION HAS NO EFFECT.

A. Pro-Television Advocates Have Attempted to Place the Burden on the Accused to Show Prejudice.

Those persons supporting the televising of court proceedings have cleverly tried to shift the burden to those opposed to television, trying to require that the opposition demonstrate conclusively the prejudice caused by the introduction of television. The obligation should be on those trying to bring extraneous objects into the courtroom to show that their actions will not affect the administration of justice.

Judge Francis T. Murphy, Presiding Justice of New York's Appellate Division, First Department, is of the view that television advocates bear the burden of proving that a fair trial will not be jeopardized by cameras in the courtroom:

> The issue raised by the pro-TV activities (sic) have been improperly framed, in my view. We are now asked to prove why a fair trial will not be had if the camera is allowed into the courtroom. Credit should be given to those who urge greater coverage for having shifted the burden so skillfully. I believe the burden is upon those who advocate televising judicial proceedings to clearly demonstrate that the constitutional guarantee of a fair trial will still be attained. That guarantee is solely for the accused (*Estes*).

Murphy, *Trend to Televised Court Proceedings*, 181 N.Y. Law Journal 25 (Jan. 1979).

Using the balancing test for due process analysis can be enlightening.

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute, procedural safeguards: and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

The first interest is apparent; the accused may be denied a fair trial, and further may be publicly humiliated as a result of the actions of the state.

The second risk is the high probability of an unfair trial, and the certainty of public humiliation. Substitute procedural safeguards (not permitting cameras over the objection of the defendant) solves the problem.

Finally, the government has no interest in bringing cameras into the courts, although some politicians may see a temporary public relations benefit with the media by bringing the cameras in. It should be noted that the interest of the government is not necessarily the same as that of the politicians. The fiscal and administrative burdens are clearly less when the cameras are not in the courts.

And while engaging in this balancing procedure, one overriding thought must be borne in mind:

> Given the persuasiveness of modern communications and the difficulty of effacing prejudicial publicity . . . , the trial courts must take strong measures to insure that the balance is never weighed against the accused.

Sheppard v. Maxwell, 384 U.S. 333, 362 (1966).

The analysis reveals that the accused has a high interest in not being televised over his objection, while the state has no legitimate interest in placing cameras in the courts. No

claim is made that cameras will improve the administration of justice. In addition there is no burden on the state if cameras are not in the courts.

So when the balancing test is applied the scale clearly leans toward the interest of the accused.

> In the face of demonstrated conflicts and incalculable risks, the burden of proof must shift from the potential victims to the proponents of trials by TV.

Gerbner, *Trial by television: Are we at the point of no return?*, 63 Judicature, 417, 426 (April, 1980).

B. Common Sense Means the Burden of Proof Passes to Those Bringing Cameras Into the Courtroom.

The court has in the past used plain old fashioned common sense to determine whether procedures are likely to deny the accused due process of law.

The court evaluated the effects of the accused wearing prison clothing during a trial. *Estelle v. Williams*, 425 U.S. 501 (1976). It is interesting what was not said. No one claimed that a scientific study was needed to show that this could influence jurors against the defendant.

> The actual impact of a particular practice on the judgment of jurors cannot always be fully determined.

Id. at 504.

Yet the court still ruled, basing its ruling on common sense and common knowledge, that requiring a defendant to appear in prison garb over objection was constitutionally infirm. It would only be permitted where there was no objection, where it could not be avoided or when the fact the accused was a prisoner was apparent from the case.

When certain errors are made during the trial, the majority of this court has consistently ruled that instructions cannot solve the problem.

> The naive assumption that prejudicial effects can be overcome by instructions to the jury *** all practicing lawyers know to be unmitigated fiction.

Bruton v. United States, 391 U.S. 123, 129 (1968) quoting from *Krulewitch v. United States*, 336 U.S. 440, 453 (Jackson, J., concurring) (1949).

The court did not ask for a scientific study to determine how jurors would act. It did not interview jurors to hear them say, "of course, I followed the instruction and rendered a fair verdict." It is obvious that persons are not going to admit to being unfair, particularly if their verdict resulted in the loss of the defendant's life, liberty or property. They may not even know in their own minds that they have been unfair.

> Human traits being what they are, no juror is going to admit in some subsequent poll that his decision was influenced by extraneous considerations such as the presence of cameras in the courtroom.

Post-Newsweek (Report of the Florida Conference of Circuit Judges, *supra*, at 14).

The point is, courts have recognized that it is clearly impossible to prove that what occurs in the courtroom denies the accused a fair trial. Instead, courts have relied on common sense and common knowledge. It has not said that some procedures may be unfair and others fair, and we don't know which were involved here. It has relied upon the concept that where there is the appearance of justice, there will more likely be justice. And where there is the appearance of factors that could cause injustice, then the procedures are questioned.

C. Both Common Law and Constitutional Law Place the Burden on Those Bringing Cameras Into the Courtroom to Show There Was No Error.

The state of Florida has made a decision to bring cameras into the courts, regardless of an objection by the accused.

There is no claim that the cameras are being admitted to improve the administration of justice. While no evidence has been presented to show that television improves the image of those televised, the cameras allegedly are being brought in for that purpose. Stated simply, the cameras are being brought in as a public relations gesture to improve the image of the judges.

> [Television] will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system.

Post-Newsweek Stations, Florida, 370 So.2d 764, 781 (1979).

Judges can best maintain a proper image by protecting the interests of all who pass before them. Public relations stunts are not a legitimate interest of the courts.

On the other hand, the Florida Supreme Court refutes its own public relations claim.

> [S]elective editing, with or without ulterior motive, can affect the accuracy with which a legal proceeding is reported.

Id. at 776.

The Florida Supreme Court even conceded that there are risks involved that it was willing to take.

> [W]e are not unmindful of the perceived risks articulated by the opponents of change. However, there are risks in any system of free and open government.

Id. at 781.

There is, of course, a system of free and open government that does not involve the risks of which the Florida Supreme Court is not unmindful. That is, to have public trials without cameras.

Since the courts now find it their purpose to seek a good image, other changes might be introduced. Perhaps the

courts could respond to the common complaint that proceedings are dull by bringing a circus in to perform during trials. Who would be required to show that the circus distracts jurors and therefore may prevent the proper evaluation of the evidence? The courts might look at the extraneous matter put into the trial and say, the defendant must prove that the jurors were so distracted by what occurred in the courtroom that they could not fairly consider the evidence. Of course, the jurors would all announce, after the fact, that they heard and fairly considered all the evidence.

The more logical approach is for those advocating bringing in foreign matter, unrelated to the proceedings, to prove that what they are doing does not affect trial participants.

The court could always say, one cannot prove the jurors were affected, therefore the constitutional guarantee of a fair trial does not come into play. Since such reasoning is asking a criminal defendant to prove what cannot be proved, the reality of such an approach is to say the 14th Amendment does not apply to criminal trials.

We suggest the better approach to such a situation is to adopt the common law reasoning of *Chapman v. State of California,* 366 U.S. 18 (1967): "The original common law harmless error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." *Id.* at 24.

The court further states: "[B]efore a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*

We suggest that it is the burden of the state, that publicly displays the accused for the benefit of the television industry, to show beyond a reasonable doubt that such a display did not result in a public shaming of the individual before

any conviction and beyond any sentence that may have been imposed. Further, the burden should be on the State of Florida to show, beyond a reasonable doubt, that the cameras in the court in no way affected the participants and the jurors in this case. "The courts must take such steps by rules and regulation that will protect their processes from prejudicial outside interferences." *Sheppard v. Maxwell,* 384 U.S. 333, 363 (1966).

Does the public trial guarantee mean that the presence of cameras does not change anything, since what occurs in the courts can be reported anyway. This court has been consistent in holding that "public ' trial does not mean that cameras have a right to be in the court. *Nixon v. Warner Communications,* 98 S.Ct. 1306, 1318 (1978).

To many, the public trial is a right belonging to the defendant. "Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant." *Gannett Co. Inc. v. DePasquale,* 99 S.Ct. 2898, 2905 (1979).

It would appear unseemly to use, to the defendant's detriment, a device intended for his protection. The purpose of the public trial guarantee is to allow the defendant to bring in outsiders to ensure the procedures are fair, not to expose the defendant to display by the masses.

On the other hand, those who see the Sixth Amendment as one which guarantees a common law right of a public trial (see dissent in *Gannett Co., supra*) still must examine the use of cameras in the courts to determine if it is consistent with that common law right. If the purpose of public trials is "to protect the integrity of the trial . . ." *Gannett Co., supra,* at 2930, then the effects of the cameras must be examined to see if they interfere with that concept. Opening the court to the public is far different from allowing it to

be used as a forum by politicians. Opening the court to the public is far different from exposing witnesses to the homes of other members of the community. Opening the courts to the public to ensure the integrity of the process is far different than humiliating the accused by publicly displaying him in the homes of the public.

If the common law public trial existed to ensure the integrity of the process, then it should not be used to sacrifice that integrity. If the 14th Amendment incorporates that common law protection, then what the courts do contrary to the purposes of that protection violates the 14th Amendment.

Proponents of television in the courtroom argue that public policy is better served and the public itself becomes more informed by television's presence. The Brief of the Florida Bar Opposing Post-Newsweek Stations' Proposed Rule of Judicial Conduct addresses that issue:

> Arguments of public policy are a thin and misleading disguise for a commercial venture. If broad exposure were the objective courtroom functions, then trials could easily be held in lighted coliseums at night.

Id. at 12.

As to the issue of education of the public, there are those who are skeptical, notably the Florida Circuit Judges.

> It appears that an effort is being made to convince the judiciary that permitting cameras in the courtroom will help to educate the public concerning the operation of the State's legal system . . . . First, it represents, we feel, a false hope. The fact is that the public will be "educated" only as to how the legal system operates in the more celebrated cases and then only as to those portions which the media feels will hold the attention of the viewing audience beyond a few seconds or minutes. The public will not be educated as to how the legal system operates the other 99% of the time simply

> because the media would have no interest —and understandably so—in showing the tedium with which the legal system is concerned in most cases. Secondly, the trial of a litigated case is not, and should never be regarded as, a civics classroom or laboratory for teaching the public how our legal system operates.

Post-Newsweek (Resolution of the Circuit Judges of the Fourth Judicial Circuit of the State of Florida on the Issue of Television and other Cameras in the Courtroom, at 12).

Conclusion.

Historically, trials have frequently served functions other than the ascertainment of truth. As Chief Justice Warren pointed out in *Estes,* 381 U.S. at 575, the Francis Gary Powers trial in the Soviet Union was televised, hardly for the purpose of insuring a fair trial. The process of televising trials for the purpose of educating the masses has continued to the present day, most recently by the new Islamic Government in Iran. California's criminal defense attorneys do not wish to allow that type of proceeding to occur in this country, either intentionally or unintentionally!

Those who have represented accused individuals, are well aware that many defendants will make decisions whether or not to seek to defend themselves against actions brought by the prosecution, because of the existence of cameras in the courts. Some, of course, will enjoy the attention. Most will be reluctant to appear. Some will agree with Benjamin Rush's words of over 200 years ago.

> "Ignominy is universally acknowledged to be worse punishment than death."

An Enquiry into the Effects of Public Punishments Upon Criminals, and Upon Society (Philadelphia, 1787) at 8. [Found in *American Law: The Formative Years* (Anno. Press, N.Y. 1972).]

Television then becomes "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California*, 380 U.S. 609, 614 (1965). The imposition of such a burden for exercising a constitutional privilege must not be tolerated.

As this brief is being prepared, the media is full of stories of a riot that Miami suffered for several days. The reader of this brief has probably forgotten the incident; however the newspapers reported that 15 persons died. The riot began shortly after the *televised* verdict in a trial. That trial permitted cameras throughout. (*L.A. Times*, Part I, page 1, 16; May 19, 1980). It does not appear that television increased the respect of the citizens of Miami for the courts, and may have contributed to the increase in tensions and unrest following the verdict. Television may have made the citizens feel they were participants in the trial itself.

The previous paragraph was written May 20, 1980. On May 22, the *Los Angeles Times* carried the following article, Part I, page 10. Byline Miami. "RIOT RENEWS DEBATE OVER TV COVERAGE OF TRIALS." The article quoted several people who thought the brief television excerpts on the evening news distorted the proceedings, thereby inflaming the community. It noted that some attorneys stated that "television viewers here did not see the same trial that the jury saw." Attorneys and news media people, according to the article, agreed that "two courtroom events lent themselves readily to television coverage." The article went on to state the view of the defense attorneys regarding the coverage of the dramatic moments.

> [I]t is much harder to see or understand in brief television segments the slow, methodical processes of corroborating testimony, impeaching witnesses and estab-

lishing individual culpability that are fundamental to a criminal trial.

Once again we find that cameras are neither educational nor do they increase the confidence of the public in the system.

The courts do not exist for the purpose of education, entertainment, or public relations.

Unrestricted televising of trials will influence the behavior of all who appear and permanently cause the soundness of the system to be questioned.

Government may properly exercise its power to force a person to appear at a trial. However, when government then subjects that person to non-essential public display, such action constitutes an assault on human dignity.

Respectfully submitted,

HERBERT M. BARISH,

Counsel for Amicus Curiae.